Title 40—PROTECTION OF ENVIRONMENT

Chapter I—Environmental Protection Agency

PART 2—PUBLIC INFORMATION

Trade Secrets and Privileged or Confidential Information

On December 3, 1971, the Environmental Protection Agency published, at 36 F.R. 23058, final regulations to implement the Freedom of Information Act provisions of 5 U.S.C. 552. On the same date, EPA proposed amendments, at 36 F.R. 23077, to add a new § 2.107a to those final regulations. The new section was proposed to deal with the issues raised by requests for information said to contain trade secrets or other confidential information, and therefore exempt from mandatory public disclosure under 5 U.S.C. 552(b)(4) and § 2.105(a)(4) of the EPA regulations. Public comment was invited on the amendments, and the time for comment was subsequently extended through February 2, 1972, by a notice published at 37 F.R. 621 (January 14, 1972).

The amendments published here have been modified as a result of comments received. It is appropriate at this time to set forth EPA's reasons for proposing the amendments and for including in them the changes reflected below.

It became clear during the first year of EPA's existence that it could expect to receive a comparatively large number of requests from members of the public for information submitted by other members of the public, particularly by regulated industries.

Much of the information requested, however, was information of the sort described in 5 U.S.C. 552(b)(4), and exempted from mandatory public disclosure as "trade secrets and commercial or financial information which is privileged or confidential * * *" It is EPA's position that some of the information described in 5 U.S.C. 552(b)(4) is required to be kept confidential—most notably, trade secrets. This requirement is not imposed by 5 U.S.C. 552(b)(4), since the exceptions in the Freedom of Information Act are merely a list of those types of information which an agency may withhold. Accordingly, if an agency is required to withhold information, it is by virtue of some other statutory provision. In this case it is 18 U.S.C. 1905, which makes it a criminal offense for a government employee to release trade secrets and certain specified financial information, in the absence of express statutory authority to do so. (For an example of such authority, see section 307(a)(1) of the Clean Air Act, as amended, 42 U.S.C. 1857h–5, which permits the disclosure of trade secrets "when relevant in any proceeding under this Act.")

Because the categories of information listed in 5 U.S.C. 552(b) are broader than the categories of information which an agency must at all times withhold, EPA faced two principal problems in administering the Freedom of Information Act with respect to requests for certain information submitted by industry.

First, it needed to establish procedures for ascertaining when a bona fide trade secret was in its hands. Paragraph (a) of the new § 2.107a attempts to fulfill this need. Paragraph (a) is largely unchanged in substance from the version previously proposed. In response to several thoughtful comments, however, it was decided that certain time limits established by other sections of Part 2 need not be suspended unless a question actually arises as to whether information requested constitutes trade secrets. Thus, paragraph (a)(3), as adopted, differs from the proposal in being contingent on receipt of a claim of trade secrecy. On the other hand, and notwithstanding several comments received, it is not felt that the General Counsel could respond intelligently to many disputed claims of trade secrecy within the maximum of 10 working days provided for in cases involving other exemptions. EPA has received single requests for several hundred separate items of information claimed to be trade secrets, and it anticipates that such requests may be relatively frequent. While EPA will try to make determinations as quickly as possible, it cannot in good faith bind itself to an unrealistically short deadline, particularly where its decisions on complex issues of fact and law will affect private property rights.

In addition, a new subparagraph permitting "advisory opinions" on trade secrecy claims has been added by subparagraph (4) of § 2.107a(a). This is a procedure suggested by several comments—which came, interestingly, from organizations having presumbaly divergent interests.

However, EPA has rejected the suggestion that paragraph (a) be changed to require formal administrative hearings, and notes that 5 U.S.C. 552(a)(3) authorizes de novo judicial review.

The final noteworthy change in paragraph (a) relates to the status of information submitted in support of a claim of trade secrecy. It was formerly EPA's presumption that such information would always be eligible for discretionary withholding under 5 U.S.C. 552(b)(4). On reconsideration, it appears that that presumption may be unjustified, as in the case of submissions which are argumentative in nature. Accordingly, submissions in support of claims of trade secrecy will be treated like any other information in the hands of EPA.

In addition to clarifying the procedures for determining when information is a "trade secret" and therefore subject to mandatory restrictions against public disclosure, the amendments published today also define that information which is "privileged or confidential" and which EPA will withhold from the public, even though not required to do so. (Many otherwise thoughtful comments erroneously assumed that any information covered by 5 U.S.C. 552(b)(4) must be withheld from the public, and that an agency has no discretion to release it.) Paragraph (b) of the new § 2.107a states, in effect, that when a private party is required to submit information which EPA is not legally required to keep confidential, EPA will not agree to withhold that information from the public. On the other hand, when EPA wishes to obtain the voluntary cooperation of a private party—as, for example, when it invites contract or grant proposals, or when it wishes to inform itself on the state-of-the-art of pollution abatement—it must be free to give assurances that the submitted information will not be available to competitors of the party making the submission.

Paragraph (b), as adopted, contains no substantial changes from the proposed version, except that it binds EPA to honor pledges of confidentiality made by government agencies when EPA has received from them information which it has no legal right to obtain directly from the original private source.

For the foregoing reasons, Part 2 of Title 40, Code of Federal Regulations, is hereby amended as follows, effective 30 days following publication in the FEDERAL REGISTER (6-12-72):

1. The table of contents at the beginning of Part 2 is amended by inserting therein in sequence:

Sec.
2.107a Trade secrets and privileged or confidential information.

2. A new § 2.107a is added, reading as follows:

2.107a Trade secrets and confidential information.

(a) *Trade secrets.* (1) In the event records requested under this part may contain trade secrets, the office responsible for maintaining the records requested will forward the request for determination and accompanying materials referred to in § 2.105(b) only to the Office of General Counsel, and the notice referred to in § 2.105(b), unless published in the FEDERAL REGISTER, will be sent by certified mail (return receipt requested): *Provided,* That notice under § 2.105(b) need not be given if similar notice was given prior to referring the matter to the Office of General Counsel.

(2) If a person to whom notice of a request for records has been given under § 2.105(b), or otherwise, advises the Office of General Counsel, in writing, prior to the expiration of 10 working days following the receipt or publication of such notice, that the requested records contain trade secrets furnished by such person, the portions of such records said to contain trade secrets shall not be disclosed, nor copies provided, unless the General Counsel shall first have made a final written determination that such records do not in fact contain trade secrets, or unless such disclosure is authorized by statute in spite of the provisions of 18 U.S.C. 1905. In the event no claim or other response is received by the Office of General Counsel prior to the expiration of the 10 working days specified herein, it will, before reaching a determination with respect to trade secrecy, make prompt inquiries to ensure that the absence of a response hereunder is not attributable to delay or failure of the mails. A claim, including a claim asserted by telephone, made at the time of such inquiries and confirmed in writing will be considered timely for purposes of subparagraph (3) of this paragraph. The Office of General Counsel will promptly notify the requesting party whenever a claim is made under this subparagraph. In making a determination under this subparagraph, the General Counsel will consider any additional information submitted to the Office of General Counsel within 30 days of receipt of a claim made hereunder, or within such longer time period requested by the claimant or the requesting party as it may agree to. If authorized by 5 U.S.C. 552(b)(4), the Office of General Counsel may agree to treat any such additional information as confidential at the request of the person submitting it, in which case it will not be disclosed without the express written permission of the person submitting it. If the General Counsel determines that the records requested do not contain trade secrets, notice of such determination will be served by certified mail by the Office of General Counsel upon the person making the claim. No sooner than 30 days following the mailing of such notice, the requested records will be disclosed in accordance with this part.

(3) In the event a timely claim is made under subparagraph (2) of this paragraph, the time limits specified in §§ 2.-106(a) and 2.107(a) will be extended. In addition, the time limit specified in § 2.-106(a) will be extended to include the time required for the prompt inquiries by the Office of General Counsel, referred to in subparagraph (2) of this paragraph.

(4) On request of an interested party, the General Counsel may issue written determinations as to whether specified information contained in EPA records does or does not constitute trade secrets, whether or not a request for information has been made under this part. In the event a request is subsequently made under this part for information previously so determined to constitute trade secrets, EPA will be bound by that previous determination, unless the General Counsel: (i) Determines that subsequent events have destroyed the trade secrecy of the information in question, and (ii) gives written notice of such determination, and a full explanation of the basis therefor, to any person making a claim under subparagraph (2) of this paragraph.

(b) *Privileged or confidential information.* (1) Privileged or confidential information (other than trade secrets or financial information the disclosure of which is prohibited by 18 U.S.C. 1905), which is referred to in 5 U.S.C. 552(b)(4) and § 2.105(a)(4), and defined in subparagraph (2) of this paragraph, will not be disclosed under this part without the express written permission of the person providing it to EPA.

(2) For purposes of this paragraph, "privileged or confidential information" means information which an agency is authorized (but not required) by law to withhold from the public and which is either:

(i) Submitted to EPA pursuant to, and in reliance on, a pledge of confidentiality contained in any EPA form, or obtained in writing from EPA; or

(ii) Received from a State or Federal agency which in turn has received the information pursuant to, and in reliance on, a pledge of confidentiality, and which continues to consider itself bound by such pledge (unless EPA is entitled by law to demand such information from the original private source).

(3) No pledge will be made by EPA under subparagraph (2) of this paragraph in connection with information which EPA is entitled by law to demand (such as emission data under section 114 of the Clean Air Act, 42 U.S.C. 1857c-9) or which is submitted to EPA to fulfill a requirement imposed by statute or regulation in connection with a regulatory scheme of general applicability (such as information contained in application for registrations, permits, certifications, and the like). Nothing herein is intended to affect the status of information which is required by law to be treated as confidential.

3. The last sentence of § 2.111(a) is revised to read:

§ 2.111 Payment.

(a) * * *

For purposes of this section, "processing" shall include all time spent in gen- correspondence related to a request and in making determinations under §§ 2.106, 2.107 and 2.107a.

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